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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

CHARLES JOSEPH O'BRIEN and
THOMAS PARISI,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Charles Joseph O'Brien and Thomas Parisi pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on August 30, 1966.

OPINIONS BELOW

The opinion of the District Court is reported at 255 F. Supp. 755 and appears in the record at pp. 271a-320a.[1] The

[1] Petitioners have filed 9 additional copies of the record (appendix) printed for consideration of the Court of Appeals in which the opinions of the district judge are reproduced in full (Rule 23 (1) (i)). All references followed by "a" are to the appellants' joint appendix filed in the Court of Appeals.

opinion of the Court of Appeals is reported at 365 F.2d 601, and is printed as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered August 20, 1966 (Appendix B, *infra*). A timely petition for rehearing was denied on October 6, 1966 (Appendix C, *infra*). On October 20, Mr. Justice Potter Stewart extended the time within which to petition for a writ of certiorari to December 5, 1966. Jurisdiction is conferred on this Court by 28 USC §1254.

QUESTIONS PRESENTED

1. Is an indictment under 18 U.S.C. §549, which charged defendants with having unlawfully removed merchandise from a bonded warehouse fatally deficient if it does not allege the existence of a felonious intent on the defendants' part?

2. Where a statute punishes certain acts when done unlawfully, but does not specify when such acts become unlawful, is it sufficient for an indictment thereunder merely to allege that the defendants did such acts unlawfully without setting forth the basis for the claim of unlawfulness?

3. Is a defendant deprived of his constitutional right to a trial by jury when the Court instructs the jury that an essential element of the offense has been proved?

4. In a criminal case where the accused has not testified, is it a violation of his constitutional rights for the prosecutor to argue to the jury that testimony which only the accused could contradict stands uncontradicted?

5. Is it an essential element of the crime punishable by 18 U.S.C. §549, of unlawfully removing merchandise from a bonded warehouse and Customs custody and control, that there be knowledge on the defendants' part that the merchandise involved was in a bonded warehouse or otherwise in Customs custody or control?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution—Amendment V provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; . . ."

2. Constitution—Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . ."

3. Section 549, Title 18, U.S.C. provides in pertinent part:

> ". . . Whoever . . . unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs custody or control; . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than two years, or both."

4. Section 3481, Title 18, U.S.C. provides in pertinent part:

> "In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

5. Section 1484(j), Title 19, U.S.C. provides in pertinent part:

> "(j) Merchandise shall be released from customs custody only to or upon the order of the carrier . . ., except that merchandise in a bonded warehouse shall be released from customs custody only to or upon the order of the proprietor of the warehouse . . ."

6. Section 1555, Title 19, U.S.C. provides in pertinent part:

> "Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for the re-packing, sorting or cleaning of imported merchandise . . . Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; . . ."

STATEMENT OF THE CASE

The Steamship Montrose sank in the Detroit River in July, 1962 (339a). In the course of salvage operations, some merchandise was removed and placed at the Detroit Harbor Terminal. In March, 1963, Parisi and a co-defendant, Finazzo,[4] removed a statue of St. Theresa, some brass valves, and marble slabs from the Detroit Harbor Terminal and took them to Parisi's warehouse.

Two or three days later, customs agents arrested Parisi at his warehouse (58a-66a). Parisi admitted removing the articles from the Terminal. He said it was done at the request of Finazzo and that Finazzo could explain the whole thing (67a). He was permitted to make a telephone call and within half an hour, Finazzo, accompanied by petitioner O'Brien, came to Parisi's warehouse (71a, 72a). They both were placed under arrest.

The Indictment

O'Brien, Finazzo and Parisi were indicted under 18 USC §549 in three counts for removal of the statue of St. Theresa, the marble slabs, and the brass valves. The three counts, in similar language, charged essentially that they "did unlawfully remove certain merchandise from a bonded area • • • and from custody and control of the United States Custom Service" (5a, 6a).

At commencement of trial, the defendants moved to dismiss the indictment for failure to state an offense (15a-21a). The motion was denied (175a-177a). The challenge to the indictment was renewed by motions in arrest of judg-

[4] Finazzo was acquitted by the Court on motion for judgment of acquittal (181a).

ment (259a-260a). They were denied by a written opinion (311a-320a).

The Instruction to the Jury on Area B

The Detroit Harbor Terminal operates both a general warehouse and a bonded warehouse for the storage of imported merchandise pending customs' clearance (43a, 342a). It consists of two large buildings and two large open areas known as Area A and Area B (92a-95a). In its application for licensing as a bonded warehouseman, the Terminal had designated portions of the buildings and Area B as bonded warehouses (45a-46a, G. Ex. 27, 27a, 27b). The application stated Area B was to be used for export and import cargo (92a).

The goods involved in this case were all placed in Area B where they remained until removed by the defendants Finazzo and Parisi (41a, 362a). At trial, defendants argued that Area B was not and could not be a bonded warehouse because it was not an inclosure as required by law[3] (255a), being fenced on only two sides (94a, 95a); because it was used for storage of both bonded and unbonded merchandise (95a, 356a-358a); and because of defects in the application for bonding the area (97a-99a).

The Court instructed the jury that as a matter of law, Area B was a bonded warehouse (203a, 206a-209a, 221a). Defendants duly excepted to this instruction (235a).

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[3] 19 U.S.C. §1555

"Buildings or parts of buildings and *other inclosures* may be designated by the Secretary of Treasury as bonded warehouses * * *" (Emphasis added.)

The Prosecutor's Closing Argument

O'Brien was the business agent for the union representing the employees of the Detroit Harbor Terminal (120a). When arrested, he told the customs agents that 5 or 6 months before, William Young, the owner of Detroit Harbor Terminal, had asked him if he would arrange to have someone remove some scrap from the Terminal. Two or three months later, he said, remembering his conversation with Young, he asked Finazzo if he would be interested in removing some scrap (70a, 73a, 131a).

The government called Young as a witness (118a). He testified that although he never gave O'Brien or anyone else permission to remove the salvage merchandise in question, he could have talked to O'Brien about removal of some scrap (120a, 121a).

The government elicited from Young that he had not talked to O'Brien about the matter since O'Brien's arrest (121a, 122a). This testimony was the basis for the following argument in the government's rebuttal summation:

> "[I]s it believable to you that Mr. O'Brien is going to sit around for a year and a half, up to the very day of this trial, and in fact, up to the date of Mr. Young taking the stand and not go to Mr. Young and not ask Mr. Young?
>
> "'Look, Mr. Young, I am in trouble here. Didn't you tell me several months before this merchandise was released that you had given me permission to negotiate for the scrap removal?'
>
> "Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire eighteen months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of this trial, and yet, Mr. Young testifies, 'No, O'Brien never has talked to me since about this subject.' And there is no contradiction of that at all in this record." (211a)

O'Brien moved for a mistrial urging that the argument, particularly the last sentence, was a comment on his failure to testify, he being the only one who could contradict Young's testimony on this point (212a-214a). The motion was denied (284a-288a, 366a).

Defendants' Request for Instructions on Knowledge

There were no custom tags on the merchandise here involved (42a). It was all in a pile out in the open covered with snow and exposed to freezing conditions (352a, 353a). Other merchandise which was not as badly damaged was placed in the enclosed warehouse building (353a).

The prosecutor conceded that there was nothing "to indicate to a stranger that these goods were in the custody of the Customs at the time they were allegedly removed" (173a).

Petitioners requested the Court to instruct the jury that if the defendants did not know the merchandise was in a bonded warehouse or otherwise in customs custody, they should be acquitted (254a). The requested instruction was refused and exception taken (235a).

Parisi was convicted on two of three counts. O'Brien was convicted on all three counts (246a, 247a). Motions for new trial were filed (259a, 261a-264a) and denied (271a-309a).

REASONS FOR GRANTING THE WRIT

I.

THE INDICTMENT WAS FATALLY INSUFFICIENT IN THAT IT DID NOT CONTAIN THE ESSENTIAL ELEMENTS OF THE OFFENSE.

The decision of the Court of Appeals holds that the use in the indictment of the word "unlawfully" in the phrase "unlawfully removed" charges the felonious intent requisite for violation of 18 U.S.C. §549. This conflicts with the decision of the First Circuit Court of Appeals in *Hughes v. United States*, (1964) 338 F(2) 651, which the Court of Appeals here expressly refused to follow:

> "[Hughes] is analogous to the case at bar but the district judge did not follow it and neither do we." (Appendix A, *infra*, p. 23)

Hughes concerned precisely the same charging language under precisely the same sub-paragraph of 18 U.S.C. §549. It held the indictment invalid precisely because "unlawfully" does not charge the requisite felonious intent. On this point, the *Hughes* case followed the doctrine of *United States v. Carll*, 105 U.S. 611. The *Carll* case, ignored by the Court below, holds that an essential element of an offense (guilty knowledge in *Carll*, felonious intent here) not set forth in the statute must be set forth in the indictment "without any uncertainty or ambiguity."

The square conflict between the First and Sixth Circuits on the fundamental issue here presented requires resolution by this Court.

II.

PETITIONERS' RIGHTS UNDER THE SIXTH AMENDMENT TO BE INFORMED OF THE NATURE OF THE ACCUSATION AGAINST THEM WERE VIOLATED BY THE FAILURE OF THE INDICTMENT TO INFORM THEM IN WHAT RESPECTS THEIR ACTS WERE UNLAWFUL.

Indictments drawn under penalty statutes—those that provide punishment for doing an act unlawfully while leaving to other statutes or regulations the definition of unlawfulness—require some allegation to show why the act is unlawful, usually a reference to the other statute or regulation. Without such an allegation, the defendant will not be afforded his Sixth Amendment right to know "the nature and cause of the accusation." *Keck v. United States*, 172 U.S. 434.

Circuits other than the Sixth recognize this requirement as essential to the defendants' right to know the issues he will face at trial.

Thus, in the Ninth Circuit, an indictment for importing marchandise "contrary to law" which does not mention the law which the importation violated was held not to allege an offense. *Steiner v. United States* (1956), 229 F(2) 745.

A like rule prevails in the Fifth Circuit, *Babb v. United States* (1955), 218 F(2) 538. To the Fifth Circuit it makes no difference whether the penalty statute involves acts performed "contrary to law" or acts performed "unlawfully." *Sutton v. United States* (1946), 157 F(2) 661, which voided an indictment for "unlawful" possession of rationed sugar because "the unlawfulness was not shown in the indictment."

The indictment which petitioners faced told them only that they were charged with an unlawful removal. It no

more advised them of the issues they would meet at trial than would an indictment under 26 U.S.C. §7201 charging tax evasion but not stating the tax statute claimed to be evaded.

The record in this case discloses the unenviable position in which petitioners were placed.[4] The Government argued to the jury that the defendants were thieves and had committed a larceny (365a). The Court did not submit the theft issue to the jury but instead read to the jury from 19 U.S.C., §1484(j) (221a, 222a), which sets certain conditions for the release of merchandise from customs' custody. This statute was first brought to petitioner's attention during their trial. To this day, petitioners (and their counsel) do not know whether the jury based its verdict upon the government's argument or the court's instruction.

The Districts Court's opinion, adopted by the Court of Appeals (App. A, *infra*, p. 25), attempted to distinguish the Fifth and Ninth Circuit cases and *Keck v. United States*,

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[4] Petitioners' quandry was underscored at the commencement of trial.

> "Mr. Gillis: . . . Now, what is the unlawfulness of the act of the defendants in removing this merchandise? They do not tell us. There are at least five provisions in Title 19 of the Code of Federal Regulations which permit removal of goods from the custody of the customs under proper circumstances—upon payment of duty; upon putting up a bond; upon a showing that the goods have been damaged as a result of shipwreck, under certain circumstances they can be removed from the custody of the customs lawfully upon obtaining of certain permits.
>
> "Now, what permit did these defendants not obtain? What fees didn't they pay? Why is it unlawful for them to remove this from the custody of the customs? The Indictment does not tell us, and we are here at the threshold of a trial and we don't know what the issue is in this case. Is the issue whether or not they paid the duty? Is the issue whether or not they didn't obtain some permit that is required in an obscure section of the Code of Federal Regulations? We don't know" (18a).

supra, by reading the term "unlawfully," as used in section 549, as meaning "'with wrongful intent' rather than 'contrary to the express provisions of some other statute'" (314a). Apart from the fact that such a construction might well render the statute unconstitutionally vague (*cf. Screws v. United States*, 325 U.S. 91), it was entirely inconsistent with the Court's submission to the jury of the question whether the defendants violated separate and distinct statutes and customs regulations which were not charged in the indictment.

Here is presented a question of general application affecting all prosecutions under statutes which penalize "unlawful" acts without defining wherein the acts are "unlawful." The circuits are in conflict. It calls for resolution by this Court of the question whether indictments which allege only that a defendant acted "unlawfully" meet the Sixth Amendment requirement that a defendant be informed of the "nature and cause of the accusation."

III.

THE TRIAL JUDGE RULED AS A MATTER OF LAW THAT THE OPEN AREA IN THE DETROIT HARBOR TERMINAL, FROM WHICH THE PROPERTY WAS REMOVED, WAS A BONDED WAREHOUSE, AND THUS REMOVED A FACTUAL ELEMENT OF THE OFFENSE CHARGED FROM THE JURY'S CONSIDERATION.

One of the essential elements of the offense charged was that the removal of the merchandise was from a bonded warehouse. The trial court charged the jury that Area B was a bonded warehouse (206a, 221a).

Of this instruction the Court below held:

> "In our opinion what constituted a bonded warehouse was a question of law and it was the duty of

> the trial judge, *in the absence of conflicting testimony on the* subject, to instruct the jury as a matter of law that Area B met the requirements for a Class 4 Bonded Warehouse." (Emphasis added) (App. A, *infra*, p. 27)

This is in conflict with the holding of the Third Circuit in *United States v. Gollin* (1948), 166 F.(2) 123, which condemned a similar instruction, under another statute 18 U.S.C. §409. There, the conviction was reversed even though the testimony on the interstate status of the stolen property was "uncontradicted," and there was no "indication of the defense affirmatively contesting the testimony."[1]

The question has arisen in the Fifth Circuit, *Brooks v. United States* (1957), 240 F(2) 905, where a similar instruction resulted in reversal of conviction. The decision below also conflicts with those of the Seventh and District of Columbia Circuits. *United States v. Raub* (1949), 177 F(2) 312 (7 Cir.) and *Sullivan v. United States* (1949), 178 F(2) 723 (D.C. Cir.)

The ruling below is not unique in the Sixth Circuit. See *Malone v. United States* (1956), 238 F(2) 851. Therefore, petitioners are not asking this Court merely to review an erroneous but isolated decision of the Sixth Circuit, but they are asking that this Court resolve a difference of position between circuits on a matter important to the administration of justice and affecting the basic constitutional right to a jury trial.

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[1] This case is more aggravated. Petitioners affirmatively contested whether an open area not an inclosure could legally be made a bonded warehouse, citing to the trial judge, *In Re Miller Land Co.*, 56 F. Supp. 34, 37 (159a-161a), D.C. Mont., and requested instructions to the jury that would have left the status of Area B as a question of fact for their determination (249a, 251a).

For exposition of the need for Supreme Court guidelines in this area, see the dissenting opinion of Judge Hamley in *Brown v. United States* (1964) 334 F(2) 488, 501, 9th Cir., affirmed on other grounds, *sub nom. United States v. Brown*, 381 U.S. 437, which notes the lack of Supreme Court authority and extensively reviews the conflicting Federal decisions.

IV.

PETITIONERS' FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION WERE VIOLATED BY THE PROSECUTOR'S ARGUMENT BASED ON PETITIONERS' FAILURE TO CONTRADICT GOVERNMENT TESTIMONY.

This case presents the question whether prosecutors may circumvent the prohibition against directly commenting on a defendant's privilege to remain silent, by arguing to a jury that evidence stood uncontradicted, when a defendant was the only person who could offer contradiction.

The petitioner O'Brien did not testify. In its case in chief the prosecution, on direct examination of its witness Young, proved that he had not talked to O'Brien about the matter since O'Brien's arrest. This fact was immaterial and appears to have been designedly asked so as to lay a basis for the following argument in the government's rebuttal summation:

> "Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire, eighteen months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of this trial, and let, Mr. Young testifies, 'No O'Brien never has talked to me since about this subject.' And there is no contradiction of that at all in this record." (211a)

Petitioner O'Brien's counsel moved for a mistrial on the basis of the foregoing statement, pointing out that it was plainly a comment on O'Brien's failure to take the stand, since only he was in a position to contradict Young's testimony that he had not talked to Young about the subject (213a). The District Court, however, denied the motion, holding that the prosecutor's statement was "a fair comment on the evidence," but stating that he would consider the matter further following his charge to the jury (366a). The Court thereafter denied Petitioner's motion for a new trial on the basis of the statement (261a, 283a-288a).

The Sixth Circuit agreed with the trial court that the argument of the prosecution was not prejudicial;[6] and that the trial court's general instructions cured any possible error[7] (App. A, *infra*, pp. 30-33).

Such phrases as "The evidence is uncontradicted," or "Defendant has offered no evidence on the subject" have usually been held not to be a comment on defendant's failure to testify. But a different situation exists when contradiction can come *only* from the lips of the defendant.

In such a setting, argument that the evidence is uncontradicted is a prejudicial comment on the defendants' failure to testify according to the First Circuit in *Desmond v. United States* (1965), 345 F(2) 225. To like effect, see *Barnes v. United States* (1925) 8 F(2) 832 (8 Cir.). Cf.

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[6] Both the Trial Court and the Court of Appeals felt that the jury would draw no inference unfavorable to the petitioner O'Brien from the Prosecutor's argument because the Prosecutor hypothesized O'Brien having and having not talked to Young. However, the inevitable inference from the argument was that O'Brien could not truthfully confirm the statement he made at the time of his arrest.

[7] The holding that the general instructions "corrected any possible error" ignores this Court's decision in *Stewart v. United States*, 366 U.S. 1, 10, and conflicts with *Desmond v. United States* (1965), 345 F(2) 225 (1 Cir.).

Leathers v. United States (1957), 250 F(2) 159 (9 Cir.). The Court below adopts a contrary view.

This Court has not yet spoken on what peripheral arguments on a defendant's failure to testify by a prosecutor amount to prejudicial comment. In view of the conflict, only this Court can delineate when such arguments are violative of the Fifth Amendment.

Definitive decision in this area is made even more imperative because *Malloy v. Hogan*, 378 U.S. 1, and *Griffin v. California*, 380 U.S. 609 now require the States to apply federal standards in disposing of Fifth Amendment problems. The States are entitled to some definitions so that their Courts may function knowingly under what, to some, are entirely new rules.

V.

AN ESSENTIAL INGREDIENT OF THE OFFENSE HERE CHARGED IS THE KNOWLEDGE THAT THE MERCHANDISE INVOLVED WAS IN A BONDED WAREHOUSE OR OTHERWISE IN CUSTOMS CUSTODY OR CONTROL.

A novel question, not previously determined by this Court, is here presented, involving the nature and scope of the crime of unlawfully removing goods from Customs custody, 18 U.S.C. §549.

There was nothing about Area B, in which the property here involved was kept, to identify it as a bonded area. There were no Customs tags on the merchandise.[3] The prosecutor indeed conceded that there was nothing "to indicate to a stranger that these goods were in the custody

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[3] It was only after the merchandise was returned from Parial's warehouse that "general order" tags were placed on the merchandise (42a, 167a).

of the Customs at the date they were allegedly removed" (173a). The prosecutor, in fact, argued in his summation to the jury that it was immaterial that the defendants might not have known that the property was in Customs custody and control, and that the only question was whether the defendants were "thieves" and had "larcenous intent" (365a).

The District Court refused to charge, as requested by petitioners (248a, 254a), that before convicting either defendant, it was essential for the jury to find that such defendant knew that the merchandise involved was in a bonded warehouse or otherwise in Customs custody; and an exception was duly taken to the refusal of that request (234a, 235a).

Criminal statutes to protect the revenue require a showing of knowledge of the tax obligation because an intent to evade it is essential to a conviction. *Hargrove v. United States* (1933), 67 F(2) 820 (5 Cir.).

> "Without the knowledge the intent cannot exist." *Ingram v. United States*, 360 U.S. 672, 678.

A similar showing of knowledge (to prove intent) is required in prosecutions under criminal statutes to protect the currency. *United States v. Carll*, 105 U.S. 611. Knowledge must also be proven in smuggling prosecutions "to protect against [prosecution of] an innocent movement of merchandise across the border, without knowledge on the part of the person charged." *Wishart v. United States* (1928), 29 F(2) 103, 105 (8 Cir.).

Parity of reasoning requires a like rule under §549. The purpose of the section was to protect the United States against being defrauded of Customs duties or clearances to

which it is entitled, through the wilful, knowing and unlawful removal of property in Customs custody. The statute is thus applicable even to one who knowingly and wilfully removes his own property from Customs custody without obtaining the requisite Customs release. See *Hughes v. United States, supra,* 338 F(2) at 652. The District Court itself submitted the case to the jury on the theory that the gravamen of the crime charged was the removal of property in Customs custody for which no release had been obtained from the Customs authorities.

The Court of Appeals below disposed of this question on the ground that knowledge was not an essential element of the crime here involved, and that the case was one analogous to "offenses *mala prohibita,*" in which "the statute simply denounces the doing of an act as criminal" and "the law imputes the intent." (See App. A, *infra,* p. 27, 28). Its decision for the reasons stated is substantially in conflict with the decisions of *Carll* in this Court, *Hargrove* in the 5th Circuit and *Wishart* in the 8th Circuit.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

PHILIP A. GILLIS,
Attorney for Petitioner O'Brien,
2312 Guardian Building,
Detroit, Michigan 48226.

IVAN BARRIS,
Attorney for Petitioner Parisi,
2066 Penobscot Building,
Detroit, Michigan 48226.

ARTHUR KARGER,
600 Madison Avenue,
New York, New York.

BERNARD J. MELLMAN,
408 Olive Street,
St. Louis, Missouri.
Of Counsel.

APPENDIX A

Nos. 16,809 and 16,810

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THOMAS PARISI and
CHARLES JOSEPH O'BRIEN,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan Southern Division.

Decided August 30, 1966.

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. These cases are on appeal by Thomas Parisi and Charles Joseph O'Brien, defendants-appellants, from a judgment of conviction in the United States District Court for the Eastern District of Michigan, Southern Division. These appellants, whom we will call defendants, along with one Sam Salvatore Finazzo, were jointly indicted on a three-count indictment charging them with unlawfully removing certain merhcandise from a bonded area at the Detroit Harbor Terminal and from the custody and control of the United States Customs Service, in violation of Section 549, Title 18, U.S.C.[1]

[1] "Whoever maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, *or unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs custody or control;*" * * * (Emphasis added.)

The first count charged that they removed fourteen cases containing marble slabs and table tops, with identifying markings, on or about March 19, 1963. The second count charged the removal of a marble statue of St. Theresa on or about March 18, 1963. The third count charged that they removed twenty-one cases containing brass valves and fittings and chrome valve handles on or about March 18, 1963. Each count,[1] except as to the date and description of merchandise removed, is identical in terms of the offense charged.

The trial judge sustained a motion for a judgment of acquittal, on behalf of Finazzo, at the close of the government's testimony. The defendant Parisi was found guilty on the second and third counts and the defendant O'Brien was found guilty on all three counts of the indictment. Parisi was sentenced to imprisonment for eighteen months and O'Brien for one year and one day.

The merchandise involved in the indictment had been a part of the cargo of the SS Montrose which sank in the Detroit river on July 30, 1962. Some of this merchandise was salvaged in September 1962, while the ship was still submerged. The remainder of the cargo was removed from the ship in November 1962, after it was refloated. All of this salvaged cargo was taken to the Detroit Harbor Terminal. The merchandise was placed under a General Order by the Collector of Customs upon its discharge from the ship. (Physical possession taken by Collector of Customs who holds it until final disposition is made.)

The insurance company advertised the merchandise for sale and a Mr. Mularoni, who was the highest bidder, pur-

[1] "Count Two: The Grany Jury further charges: That on or about March 18, 1963 in the Eastern District of Michigan, Southern Division, Sam Salvatore Finazzo, Thomas Parisi and Charles Joseph O'Brien, defendants herein, did unlawfully remove certain merchandise from a bonded area at the Detroit Harbor Terminal, 4461 West Jefferson, Detroit, Michigan, and from the custody and control of the United States Customs Service, namely a marble statue of St. Theresa, which had been in Customs custody since being removed from the SS Montrose on or about July 29, 1962; in violation of Section 549 Title 18, USC."

chased some of the items which are the subject of the three counts of the indictment. A few days later Mr. Mularoni received a telephone call from Arrow Salvage Company. As a result of this call he went to the office of Arrow Salvage Company and, upon being shown some merchandise, identified it as the merchandise he had bought the week before. Mr. Mularoni notified the customs officers and the next day he went back to Arrow Salvage Company in company with customs officers. They met the defendant Thomas Parisi who showed them the merchandise and who claimed that it was his. Part of it was identified as merchandise previously purchased by Mularoni. Other items were identified as part of the cargo of the Montrose and which had been in storage at Detroit Harbor Terminal. Later, the defendants O'Brien and Salvatore Finazzo came in. After some questioning all three men were arrested and were subsequently charged in the indictment now before the Court.

Among the various assignments of error both defendants claim that the indictment does not state an offense. Since each count of the indictment is subject to the same objection made by defendants, we will refer to them as the indictment. The charge that the indictment is fatally defective and does not state an offense is based on two grounds. 1. It does not allege that the defendants acted knowingly or wilfully or with felonious intent; and 2. It does not set out with requisite specificity the offense, under the general statutory description, with which the defendants are charged.

In support of the first claim of deficiency, the defendants cite *Hughes v. United States,* 338 F.2d 651, 340 F.2d 609, C.A. 1. This case is analogous to the case at bar but the district judge did not follow it and neither do we. In *United States v. Deutch,* 235 F.2d 853, 854, C.A. D.C., the court held an indictment sufficient which charged that the defendant "'unlawfully refused to answer' five specific questions put to him by a Committee of Congress." This was a prosecution under Section 192, Title 2, U.S.C. This statute contained two offenses:

"* * * wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, * * *"

The court said:

> "Any doubt on this is resolved by the presence of the word 'unlawfully' preceding 'refused' in this indictment; that would satisfy the statute since a refusal would be unlawful only if it were wilfull. In other words, if 'refused' standing alone were held not sufficient because it does not connote a refusal which violates the statute, the presence of the word 'unlawfully' would remedy that defect."

So in the case before us, "unlawfully remove" has the same effect as "unlawfully refused to answer." To the same effect is *Logsdon v. United States*, 253 F.2d 12, 13-14, C.A. 6; *Madsen v. United States*, 165 F.2d 507, C.A. 10; *United States v. Williams*, 202 F.2d 712, 713, rehearing den. 203 F.2d 572, C.A. 5, cert. den. 346 U.S. 822; *United States v. Amorosa*, 167 F.2d 596, 597, C.A. 3; *United States v. Silver*, 235 F.2d 375, C.A. 2, cert. den. 352 U.S. 880.

In *Madsen v United States, supra*, the court said, at p. 509:

> "The sufficiency of an indictment is no longer tested by the rigors of the old technical rules of criminal procedure. The test is whether the indictment contains the elements of the offense intended to be charged and sufficiently informs the defendant of what he must meet in the preparation of his defense, and whether it is sufficiently specific to obviate the danger of the defendant being prosecuted a second time for the same offense. The indictment must allege the essential elements of the offense but mere forms of averment may be disregarded. Tested by these rules, we find no difficulty in upholding the sufficiency of the indictment."

In *Hartwell v. United States*, 107 F.2d 359, C.A. 5, the court said, at p. 362:

> "While it is certainly true that a valid indictment cannot be dispensed with as a predicate to conviction where an indictment is necessary, (Citation omitted) it is also true that the practice of fine combing indictments for verbal and technical omissions is no longer countenanced in the courts, and that a substantial compliance with the purpose of an indictment to acquaint the defendant with the offense of which he stands charged so that he can prepare his defense and protect himself against double jeopardy, is sufficient. The indictment complained of complies fully with the rule."

In *Duke v. United States*, 233 F.2d 897, C.A. 5, the court said, at p. 899:

> "The sufficiency of an indictment must be determined on the basis of practical rather than technical considerations, * * *"

See also *Risken v. United States*, 197 F2d 959, 962, C.A. 8; 4 Anderson's Wharton's Criminal Law and Procedure, Section 1749, p. 538; *United States v. Debrow*, 346 U.S. 374, 376.

The claim that the indictment does not describe the offense with specificity is without merit. Each count of the indictment describes exactly what merchandise was removed, the date that it was alleged to have been removed and that it was in violation of Section 549, Title 18, U.S.C. This section defines the offense without reference to any other statute. The defendants would have no difficulty in knowing with what crime they were charged. Neither would there be any danger of the defendants being prosecuted a second time for the same offense.

The district judge gave a scholarly opinion on the subject of the sufficiency of the indictment and we are in agreement with it. — Fed. Supp. —. We conclude that the indictment is valid and that it is "a plain, concise and defi-

nite written statement of the essential facts constituting the offense charged," as required by Rule 7(c) of the F.R. Cr.P.

One assignment of error on behalf of the defendant O'Brien is that the evidence is insufficient to sustain a conviction. The rule for an appellate court in determining the sufficiency of the evidence is stated in *Ross v. United States*, 197 F.2d 660, 665, C.A. 6, as quoted with approval from *United States v. Manton*, 107 F.2d 834, 839, C.A. 2, cert. den. 309 U.S. 664:

> "In passing upon the sufficiency of the proof, it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it."

We have read all of the evidence submitted to us in the appendices and considering it in the most favorable light to the government, it is such that, if believed, the jury could draw reasonable inferences to support a guilty finding against the defendant O'Brien. One cannot read the evidence without concluding that O'Brien was the one who was instrumental in having the merchandise removed. The question then was one of intent and that was a matter for the jury to determine under all of the facts and circumstances of the case. We agree with the trial judge that there was sufficient evidence to support the conviction of O'Brien.

One of the assignments of error urged on behalf of the defendant Parisi is that the trial court erred in not granting his motion for acquittal. The record shows that no motion for acquittal was made for defendant Parisi after verdict in accordance with Rule 29(c) F.R.Cr.P. Such motions were made during the progress of the trial. These motions raise a question as to the sufficiency of the evidence. We are of the opinion that there was ample evidence to support the conviction of the defendant Parisi.

Both defendants assign as error that the trial judge erred in instructing the jury as a matter of law that Area B was within the limits of a bonded warehouse. In our opinion what consituted a bonded warehouse was a question of law and it was the duty of the trial judge, in the absence of conflicting testimony on the subject, to instruct the jury as a matter of law that Area B met the requirements for a Class 4 Bonded Warehouse. This required the trial judge to interpret several statutes and regulations. We agree with the interpretation and analysis of the statutes and regulations as made by the trial judge in his opinion denying the motions for a new trial, as reported at — Fed. Supp. —, and conclude that there was no error in this respect.

Another claim made on behalf of defendant O'Brien is that the trial judge erred in charging the jury in such a manner that the jury could find that the defendant O'Brien had possession of the property involved, and that it could draw inferences against him of guilty knowledge and participation in the unlawful removal of the property. In support of this claim, a paragraph of the instruction, taken out of context, is quoted in the brief. Reading the entire instruction on this subject we conclude that the jury could not possibly find that the instruction with reference to inferences to be drawn from recently removed property could apply to the defendant O'Brien. We find no error in this respect.

Both defendants claim that the court erred in not charging the jury that in order to convict it was necessary for the jury to find that the defendants knew that the merchandise was in a bonded warehouse. This request was refused by the court for the reason that the statute does not make knowledge that the area, from which the merchandise was taken, was bonded an element of the offense.

No cases are cited to the effect that knowledge that the warehouse was a bonded warehouse is an essential element of the crime. *Hargrove v. United States*, 67 F.2d 820, C.A. 5, cited by counsel, in our opinion is not applicable. The question here is whether the trial court erred in not charg-

ing the jury that "a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence." The court said, at p. 823:

> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its wilful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent. (Citations omitted.) Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence."

To the same effect is *Babb v. United States,* 252 F.2d 702, 708, C.A. 5, cert den. 356 U.S. 974, also cited by counsel for defendant. In our opinion the case before us is in the first class of cases described in *Hargrove, supra.* In *Hughes v. United States, supra,* the court held that a felonious intent was a necessary element of the crime but it did not hold that a felonious intent to remove property from a bonded warehouse had to be coupled with a *knowledge* that the warehouse was bonded. We find no error on the part of the trial judge in rejecting the proffered charge.

Both defendants assign as error the failure of the trial judge to grant a new trial, for the reason that one of the jurors, Francis L. Tickner, failed to disclose that he had been an employee of government witness William P. Young, the president of the Detroit Harbor Terminal. There is attached, as an exhibit, to the motion of the defendant O'Brien for a new trial an affidavit of the witness William P. Young.

According to this affidavit, Young is the sole owner of a Michigan corporation known as Better Brands Distributing Company. Approximately fifteen years prior to January 1965, this corporation was operated at 4461 West Jeffer-

son Street in Detroit, Michigan, the premises of Detroit Harbor Terminal. Juror Francis L. Tickner had been employed by Better Brands Distributing Company about fifteen years prior to the time of the trial. He was so employed for a little more than a year and worked under the supervision of Mr. Young. It was further stated in the affidavit that on one afternoon during the progress of the trial, the juror recognized Mr. Young and told him that he had retired as a brewery truck driver.

All of the questions of the court directed to the prospective jurors in voir dire related to connections with Detroit Harbor Terminal. The juror never worked for Detroit Harbor Terminal and had no dealings or connection with it, so far as is shown by the record before us. One of the prospective jurors, a Mr. Buick, responded that he had had a brief contact with Mr. Young whom he believed was vice president of Detroit Harbor Terminal. This is the only reference to Mr. Young in the voir dire. From this, counsel for the defendant argues that the juror should have volunteered that he too had known Mr. Young. We do not think that this logically follows and that the juror can be charged with withholding information. Juror Tickner was not a party to the colloquy between the court and Mr. Buick and he may not have been alert to the significance of it. Furthermore, he might well have not realized that the Young who is now president of Detroit Harbor Terminal was the Young for whom he worked at Better Brands fifteen years before. Indeed, he may have had no recognition of Mr. Young until he saw him on the witness stand. Under these circumstances we think the juror was not called upon to make a spontaneous response.

It is argued by counsel for the government that the defendants were made aware of this matter while the trial was in progress and that they did not make timely objection to it. This assumes that counsel became aware of it at the time Mr. Young testified. This is not necessarily true and we do not find anything in the record to show when counsel first learned of the acquaintance. If it is true that counsel learned of it when Mr. Young testified, then the

government's point is well taken. *Frazier v. United States*, 335 U.S. 497, 512; *Spivey v. United States*, 109 F.2d 181, 186, C.A. 5, cert. den. 310 U.S. 631.

Finally, it is claimed that the court erred in not granting a new trial to O'Brien for the reason that government counsel made prejudicial comment on his failure to testify. The basis of this claim is the statement of government counsel "And there is no contradiction of that at all in this record," taken out of context[3] from counsel's rebuttal argument.

---

[3] "Now, ladies and gentlemen of the jury, is it believable to you that the defendant O'Brien, having told the agents earlier on March 21st it was, 'Look, I had this conversation with Young and he gave me authority or something, permission to remove this, and it was pursuant to that that I allowed these men to remove this merchandise,' this occurring in March 21st, 1963, and then, having talked not to Young but having gotten Drijver on the phone—no showing that he talked to Young on that day; is it believable to you that Mr. O'Brien is going to sit around for a year and a half, up to the very day of this trial, and in fact, up to the date of Mr. Young taking the stand and not go to Mr. Young and not ask Mr. Young?

"'Look, Mr. Young, I am in trouble here, Didn't you tell me several months before this merchandise was released that you had given me permission to negotiate for the scrap removal?'"

"Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire eight-months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of this trial, and yet, Mr. Young testifies 'No, O'Brien never has talked to me since about this subject.' And there is no contradiction of that at all in this record.

"Now, I suggest to you that there are only two inferences to be drawn from that: The first is that O'Brien didn't talk to Young because it was futile to do so. He knew that there had never been any such conversation and he wasn't going to raise the subject with Young, and get a no response, which isn't going to help him.

"So that O'Brien doesn't do it for that reason.

"And the second explanation is simply this, that possibly he did talk to Young in this 18 or 20 month period since the time of this occurrence and Mr. Young gets on the stand and says that he had not talked to O'Brien because he is trying to cover up for O'Brien; If there is to be any inference at all about the testimony of Mr. Young and Mr. Drijver, the inference is that they are very anxious to cover up for Mr. O'Brien, but they don't want to go to the extent of committing perjury to do so. They are willing to say possibly, that 'I don't recall this or that,' but they are not willing to come out and say, 'Yes, I authorized the removal; we had negotiations about the scrap removal and the like,' and that to me is the inference that this testimony lends itself to."

A motion for mistrial was made on behalf of the defendant O'Brien. Authorities[4] were cited which tend to hold that a statement to the effect that there is no contradiction in the record when only the defendant, who did not take the witness stand, could make the contradiction, amounts to prejudicial comment on the failure of the witness to testify.

Taken in the entire context of the argument of counsel, we do not think the statement constitutes comment on the failure of the defendant O'Brien to take the witness stand and to testify in his own behalf. We are of the opinion that the district judge gave an adequate and correct summary of the incident in his opinion denying the motion for new trial. He said:

> "However, it would seem that in the instant case Mr. Komives' comment that Young's testimony was uncontradicted would constitute an improper comment on O'Brien's failure to take the stand only if the jury would be likely to conclude from the statement in the context of the argument that O'Briens' failure to contradict the testimony reflected adversely on O'Brien in some manner."
>
> • • • • •
>
> "It is clear from an examination of the context of Mr. Komives' allegedly prejudicial comment that he was not attempting to suggest to the jury any improper inference concerning O'Brien's failure to take the stand. He continued his argument by stating there were only two inferences to be drawn from the uncontradicted statement of Young that O'Brien had never talked to him since—either that Young was telling the truth or that he was lying. Mr. Komives' argument to the jury was in substance that in either event it was damning to O'Brien. If Young were telling the truth, argued Mr. Komives, then O'Brien would know better than to talk to him later and try to

[4] *Linden v. United States*, 298 F. 104, C.A. 5; *Barnes v. United States*, 8 F.2d 832, C.A. 8; *Langford v. United States*, 178 F.2d 48, CA 9, cert. den. 339 U.S. 938; *Leathers v. United States*, 250 F.2d 159.

fabricate an alibi. But if Young were lying, O'Brien must have talked to him in an attempt to establish an alibi, and therefore Young was covering up for O'Brien.

"Thus, Mr. Komives, it appears to this Court, was clearly not arguing that Young must have been telling the truth because O'Brien did not take the stand to contradict him. On the contrary, the argument called Mr. Young's credibility into question, in spite of the fact that his statement was uncontradicted. The remark that Young's statement was uncontradicted was part of an argument based on opposing interpretations of Mr. Young's credibility, and when the remark is seen in this context, it is highly unlikely that the jury drew from the remark any unfavorable inference concerning O'Brien's failure to take the stand. Indeed, the jury hardly had time even to reflect that O'Brien was the only person who could have contradicted Young's statement. Further, this Court does not consider that the statement of Mr. Komives was specifically planned as a comment on the silence of the defendant O'Brien."

• • • • •

"In the opinion of this Court, the remark of Mr. Komives that Young's statement was uncontradicted was not specifically planned to prejudice O'Brien, nor did it cause the jury to look unfavorably upon O'Brien's failure to take the stand. Therefore, O'Brien, in the opinion of this Court, was not prejudiced by the remark and the remark was not improper.

"But even assuming hypothetically that the remark was prejudicial, defense counsel argued and the Court specifically instructed the jury that O'Brien had a constitutional right not to take the stand, and that no inference should be drawn from his failure to do so.

"In the opinion of this Court, such instructions corrected any possible error. Therefore, a new trial is not 'required in the interest of justice' on this ground under Rule 33."

In support of his ruling the court cited 22 C.J.S., Sec. 1098, p. 172; 8 Wigmore, Evidence, Sec. 2272, p. 436; *People v. Earl*, 299 Mich. 579. See *Langford v. United States*, 178 F.2d 48, C.A., 9, cert. den. 339 US. 938, where the court said at p. 55:

> "We believe that the remarks of the prosecutor, when considered as the jury must have viewed and understood them in the light of what transpired at the time, were not prejudicial. We have come to this conclusion, not for the reason urged by the government, but for the reason that we do not think that the remarks of counsel were made in such manner as would be likely to lead the jury to draw improper inferences."

We are asked, on behalf of the defendant Parisi, to find as plain error under Rule 52(b) F.R.Cr.P. the giving of a charge which was given in the language requested by counsel representing the defendant at the trial. The charge reads as follows: "I charge you that the defendant Parisi must have taken part in this transaction with an unlawful intent—in other words, a consciousness of guilt—" The court added to that "and that would apply, of course, to both defendants." This part of the charge followed a statement to the effect that if the jury found that either defendant reasonably believed the property to be abandoned property, the jury should acquit such defendant.

It is claimed that the objectionable instruction virtually directed the jury to return a verdict against the defendant Parisi. While the charge was framed in a poor choice of language, it is obvious what counsel meant at the time it was submitted. It is really in the subjunctive and not a statement of a fact. What it says, very poorly, is that Parisi must have had an unlawful intent before he could be found guilty. We think counsel, the Court and the jury understood it. We find no merit to this assignment of error.

The district judge concluded that the three counts of the indictment constituted but one offense and he gave each of the defendants only one sentence. We find no error in this respect .

The judgment of the District Court is affirmed as to both defendants.

APPENDIX B

JUDGMENT

(Cause No. 16,810)

(Filed August 30, 1966)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

JUDGMENT

(Cause No. 16,809)

(Filed August 30, 1966)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

APPENDIX C

ORDER

(Causes Nos. 16809 and 16810)

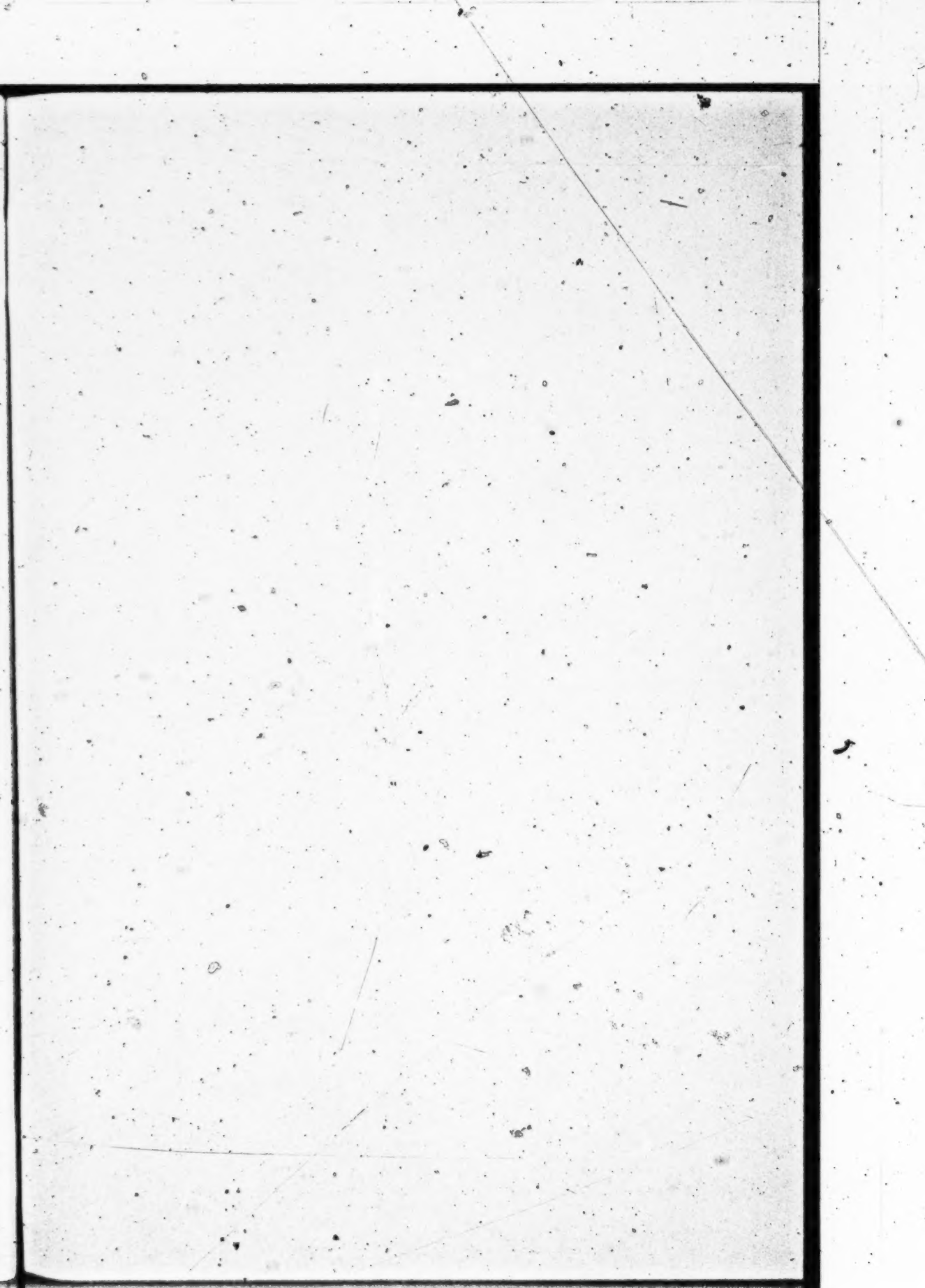
(Filed October 6, 1966)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

Upon consideration of the petition for rehearing herein, it is hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk.



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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 823

CHARLES JOSEPH O'BRIEN AND THOMAS PARISI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 365 F. 2d 601. The opinion of the district court is reported at 255 F. Supp. 755.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1966. A petition for rehearing was denied on October 6, 1966. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to December 5, 1966, and the petition was filed on December 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 549 in pertinent part as follows:

> Whoever maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, or unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs custody or control; or
>
> Whoever receives or transports any merchandise or baggage unlawfully removed from any such vessel, vehicle, or warehouse, knowing the same to have been unlawfully removed—
>
> Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

QUESTIONS PRESENTED

1. Whether the indictment, tracking the relevant language of 18 U.S.C. 549, sufficiently alleged an offense under that statute.

2. Whether the final judge correctly treated the question whether a portion of the Detroit Harbor Terminal was a "bonded warehouse" as one of law.

3. Whether a remark by the prosecuting attorney in his closing rebuttal was a prejudicial comment on petitioners' failure to testify.

4. Whether, in a prosecution for unlawful removal of merchandise from a bonded warehouse, knowledge by petitioners that the area from which they removed the merchandise was a bonded area was an essential element of the offense.

STATEMENT

A three-count indictment charged petitioners with unlawfully removing merchandise from a bonded warehouse, in violation of 18 U.S.C. 549. After a jury trial in the United States District Court for the Eastern District of Michigan, Parisi was convicted on counts 2 and 3, and O'Brien was convicted on all counts.[1] On June 17, 1965, the Court sentenced Parisi to eighteen months' imprisonment and O'Brien to imprisonment for one year and one day. The court of appeals affirmed.

The merchandise involved in the indictment—fourteen cases of marble slabs and table tops, a statue and twenty-one cases containing brass valves and fittings and chrome valve handles—had been a part of the cargo of the SS *Montrose*, which sank in the Detroit River on July 30, 1962, and was subsequently salvaged (R. 339a). After being temporarily located at a dock, the merchandise was trucked to the Detroit Harbor Terminal and placed in a bonded portion of the terminal designated as Area B (R. 40a, 46a, 343a).

The evidence showed that a Mr. Mularoni, who had purchased the marble slabs and table tops from the ship's insurer, learned that Parisi had these items in his warehouse and was attempting to sell them (R. 25a–26a). Mularoni notified customs agents, who accompanied him to the warehouse, where all the merchandise referred to in the indictment was being kept (R. 62a–64a). After the agents placed Parisi under arrest, co-defendant Finazzo and petitioner O'Brien

[1] A co-defendant, Sam Finazzo, was acquitted by the district court on motion for judgment of acquittal (R. 181a).

entered the premises. Finazzo told the officers that, some months before, O'Brien had asked whether he was interested in picking up some "scrap" at the Detroit Harbor Terminal; that he had agreed to do so; and that he made arrangements with Parisi to pick up the merchandise in question (R. 70a). O'Brien told the agents that Mr. Young, the president of the Harbor Terminal, had asked him to remove the merchandise (R. 72a–73a).

At trial, the prosecution showed that there was a prescribed manner for releasing merchandise stored in a bonded area and that no authorized release was obtained for the items found in Parisi's possession (R. 125a–126a). Mr. Young testified that he knew O'Brien, but that he had never given him permission to remove the merchandise from Area B. He could not recall any conversations with O'Brien concerning the SS *Montrose* cargo (R. 119a–121a).

ARGUMENT

For reasons discussed below (pp. 10–12), we do not oppose a remand of case to the district court for further proceedings. Since the petition seeks a determination by this Court that the indictment should have been dismissed or that a new trial should have been granted, however, we shall first set forth in full our reasons for believing that petitioners' contentions were properly rejected by the court below and do not warrant further review.

1. The indictment, tracking the language of 18 U.S.C. 549, charged that petitioners "did unlawfully remove" merchandise from a bonded area and from

the custody and control of the United States Customs Service (R. 5a–6a). After the jury was sworn, petitioners, for the first time, moved to dismiss the indictment on the ground that the term "unlawfully" was too indefinite. They relied on *Keck* v. *United States*, 172 U.S. 434, in which an indictment charging a violation of the statute (presently 18 U.S.C. 545) prohibiting "importation contrary to law" was held insufficient in not specifying the manner in which the importation was illegal. The district court, after noting the lateness of the challenge, properly concluded that petitioners' contention lacked merit.

The rationale of the *Keck* case is that, since importation is not in itself unlawful, a charge of "importation contrary" to law must specify the statute which made the specific importation by the defendants illegal. The statute involved here, 18 U.S.C. 549, is significantly different. It prohibits unlawful removal of merchandise from a "bonded warehouse," a term which bears special legal significance in itself.[2] Unlike an indictment charging "importation contrary to law," which requires further elaboration, an indictment charging the unlawful removal of specific goods from a clearly defined location, such as a "bonded warehouse," is sufficiently definite to apprise persons named therein of the charge against them. See *Wil-*

[2] A "bonded warehouse" contains dutiable merchandise upon which no customs duties have been paid; so long as the goods remain within its confines no duty need be paid. The term implicates specific legal obligations. See *Rhenenthal Print Works* v. *United States*, 51 F. Supp. 208 (E.D. La.), affirmed, 141 F. 2d 211 (C.A. 5).

Isaacson v. *United States*, 310 F. 2d 192 (C.A. 9); *United States* v. *Davis*, 272 F. 2d 149 (C.A. 7).

Following the verdict, petitioners again moved to dismiss the indictment—this time on the ground that the term "unlawfully" was insufficient to allege the requisite felonious intent. This contention was based on the then recent decision of the First Circuit in *Hughes* v. *United States*, 338 F. 2d 651. Whatever the merit of the *Hughes* decision, petitioners plainly were not prejudiced by the form of the indictment in this case. Their criminal intent was clearly proved by evidence at the trial, and the court adequately instructed the jury that an unlawful intent was an essential element of the crime (R. 224a–225a). See *United States* v. *Deutch*, 235 F. 2d 853, 854 (C.A.D.C.).

Moreover, the district court (255 F. Supp. at 759) and the court of appeals (365 F. 2d at 604–605) correctly ruled that the term "unlawfully" in the indictment encompassed the necessary criminal intent. As used in the statute, the term "unlawfully" means more than "without authority"—the term used in other sections of the statute. In view of this context, and in accord with the interpretation of similar terms in analogous statutes, the courts quite appropriately read "unlawfully" here to mean both without authority and with criminal intent. See *Logsdon* v. *United States*, 253 F. 2d 12, 14 (C.A. 6); *United States* v. *Amoroso*, 167 F. 2d 596 (C.A. 3).

Although the decisions below are not in accord with the First Circuit's decision in *Hughes*, we do not believe that the conflict on this question of pleading is

of sufficient importance to warrant review of this case. See *Gay* v. *United States*, 326 F. 2d 196 (C.A. 10), certiorari denied, 377 U.S. 1000. Resolution of the conflict is not essential where, as here, "the only effect of lack of uniformity [is] to require district attorneys in certain circuits, in drafting indictments, to add a few words not elsewhere necessary." Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238, 268, n. 73 (1934).

2. At trial, extensive evidence was produced by the government to show that the intricate legal steps required to constitute Area B of the Detroit Harbor Terminal a "bonded warehouse" had been carried out before the merchandise in question was deposited there. After the closing arguments, the trial judge advised counsel that he would leave to the jury the question whether the merchandise was in the custody of Customs when allegedly removed, but that he would hold as a matter of law that Area B was a Class 4 bonded warehouse (R. 203a). In his instructions to the jury, the district judge stated (R. 220-221a):

> It is the claim of the Government in this case, among other things, that the United States Customs Service took custody and control of the merchandise in question on the docks of the Nicholson Transit Company after it was allegedly unloaded from the Steamship Montrose, and that the United States Customs Service thereafter retained custody and control of such merchandise by placing same under what has been referred to in the evidence in this case as General Orders, and by also placing

same in storage, in the Detroit Harbor Terminal in an area designated in the applicable regulations as a Class 4 bonded warehouse.

The legal effect of Exhibits 27, 27-A and 27-B—that is the application, the sketch and the bond pertaining to storage Area B of the Detroit Harbor Terminal, and the evidence pertaining thereto—would be to constitute such storage Area B as a Class 4 bonded warehouse, as a matter of law, pursuant to the applicable statutes and regulations.

The court then instructed that if the jury found that the goods were not in a bonded warehouse when removed, their verdict must be not guilty.

The trial court's ruling that Area B was a bonded warehouse did not invade the province of the jury as petitioners contend. The term, "bonded warehouse," implies a definite legal status and distinct legal rights and obligations. Whether that status applied to the warehouse involved here was a question of law for the court. See *Blumenthal* v. *United States*, 88 F. 2d 522, 528 (C.A. 8). The cases relied upon by petitioners are inapposite. Most of them involve situations in which the trial judge commanded the jury to accept the government's undisputed version of the facts, thus depriving the jury of the freedom to reject the government's evidence.[1] As we have shown, the jury was not deprived of this freedom here.

3. During the course of the trial, testimony was elicited that petitioner O'Brien told customs agents

[1] In *Sullivan* v. *United States*, 178 F. 2d 723 (C.A.D.C.), also relied upon by petitioners, a conviction was reversed on the ground that the trial judge's comments on the facts were unfair.

that Mr. Young, the president of the Detroit Harbor Terminal, had asked him to remove the merchandise from the yard. Young testified that he had never given petitioner permission to remove the goods (R. 121a). Neither petitioner took the witness stand. In his closing argument, government counsel pointed to the fact—testified to by Young—that O'Brien had not spoken to Young during the year and a half between arrest and trial and had never asked Young to recall the alleged conversation as recited by O'Brien. Counsel argued (R. 211a):

> Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire eighteen months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of trial, and yet, Mr. Young testifies, "No, O'Brien never has talked to me since about this subject." *And there is no contradiction of that at all in the record.* [Emphasis added.]

Petitioners claim that the italicized sentence was an improper comment upon their right to remain silent. Such a contention interprets the statement out of context, for a reading of the rebuttal argument in its entirety clearly shows that the comment referred only to the strength of Young's testimony and could hardly have been otherwise understood by the jury. See 365 F. 2d 607–609. Furthermore, the court, in its final instructions, warned the jury that no inferences of guilt should be drawn from the exercise of petitioners' constitutional right to remain silent and not testify (R. 231a).

4. The court did not err in failing to instruct that knowledge by petitioners that Area B was a bonded area was an essential element of the offense. The statute does not require such knowledge as a condition of conviction. In this respect it is like other federal statutes involving unlawful removal of property. With regard to these statutes, it is well settled that knowledge that the goods were improperly taken is an essential element of the offense, but knowledge that the stolen property had travelled in interstate commerce (the requisite jurisdictional element) is not essential to support a conviction. See *Corey* v. *United States*, 305 F. 2d 232 (C.A. 9), certiorari denied, 371 U.S. 956; *Pilgrim* v. *United States*, 266 F. 2d 486 (C.A. 5); *Brubaker* v. *United States*, 183 F. 2d 894 (C.A. 6); *United States* v. *Tannuzzo*, 174 F. 2d 177, 180 (C.A. 2), certiorari denied, 338 U.S. 815.

5. Pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this Term, decided *per curiam* December 12, 1966, we have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the convictions of either of the petitioners. It appears from this inquiry that neither petitioner was the direct subject of electronic surveillance and that no such surveillance was conducted on the residence or business premises of either petitioner. We have discovered, however, that pursuant to the Departmental authorisation described at pages 2-3 of the Supplemental Memorandum for the United States in *Black* v. *United States*, 385 U.S. 26, No. 1029, O.T., 1965, the Federal Bureau of Investigation, on January 21, 1963, installed a microphone by trespass in a com-

mercial establishment which was owned by an acquaintance of petitioner O'Brien. The F.B.I. was then gathering intelligence concerning the said acquaintance, who was believed to be engaged in organized criminal activity. Petitioner O'Brien, we have learned, visited the surveilled premises shortly after the return of his indictment on May 8, 1963, and there engaged in a conversation with the owner concerning O'Brien's forthcoming trial. That conversation, although overheard by the monitoring agents and summarized in their logs, was not mentioned in any F.B.I. report nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted this case.

It also appears from the logs of this surveillance, which continued until July 27, 1964, that petitioner O'Brien was on the premises and was overheard in January 1964, when he placed a telephone call and requested one of his attorneys to file an application relating to the territorial conditions of his release on bail.[4] This conversation, like the one in May 1963, was noted in the logs of the monitoring agents but was not communicated in any manner outside the F.B.I.

While making this notification to the Court pursuant to the policy announced in *Schipani*, we think it relevant to point out features distinguishing this case from *Black* and *Schipani*. First, unlike *Schipani*, no evidence introduced at the trial was tainted in any manner by leads obtained from the overheard conversations. Second, unlike *Black*, the contents of the overheard conversations were not incorporated in

[4] The attorney's words were not overheard.

any F.B.I. memorandum and were not made known to the prosecuting attorneys in any form. Finally, while the petitioner overheard here was at least an "invitee" on the premises within the meaning of *Jones v. United States*, 362 U.S. 257, he was not, like the petitioner in *Black*, personally the subject of direct surveillance.

We enumerate these distinctions to point out to the Court that the *Black* and *Schipani* dispositions do not necessarily require that this case be remanded for a new trial. Notwithstanding the fact that one of the overheard conversations involved a communication by petitioner O'Brien to his attorney, it would be consistent with the *Black* decision, we submit, to remand this case for further proceedings in which the district court would determine, upon an adversary hearing, whether the overhearing of petitioner O'Brien's conversations produced any leads to evidence used at his trial and whether it affected the fairness of the trial in any manner. That court could then decide whether petitioners' convictions should stand.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

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[1] Although no conversation of petitioner Parisi was overheard we do not oppose the same disposition of his case as is afforded petitioner O'Brien.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 823

CHARLES JOSEPH O'BRIEN and
THOMAS PARISI,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

PHILIP A. GILLIS,
2312 Guardian Building,
Detroit, Michigan,
Attorney for Petitioner, O'Brien.
IVAN BARRIS,
2066 Penobscot Building,
Detroit, Michigan,
Attorney for Petitioner, Parisi.

ARTHUR KARGER,
600 Madison Avenue,
New York, N.Y.
BERNARD J. MELLMAN,
408 Olive Street,
St. Louis, Missouri,
Of Counsel.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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IA.

Williamson v. United States and *United States v. Davis*, cited by the Government (G. br. pp. 5-6), both involved the validity of indictments charging the unlawful importation of narcotics. The holdings were specifically limited to such prosecutions, because "Section 174, 21 U.S.C.A. makes the importation of *all narcotics* illegal, . . ."[1] "Conversely, the allegation 'contrary to law' is held inadequate as a substitute for detailed allegations where the articles involved are normal objects of lawful trade.'"[1] The rationale of these cases obviously has no application to prosecutions concerning a statue of St, Theresa.

[1] 272 F.2d at 250. The emphasis is that of the Court.

IB.

The conflict between the decision below and *Hughes v. United States* involves more than a rule of pleading (G. br. pp. 6-7). According to *Hughes,* in a prosecution under 18 U.S.C. §549 "larcenous intent—knowledge of a wrongful act—may not be dispensed with." But the Court below said "the case before us is in the first class of cases decided in *Hargrove* [*v. United States,* 67 F.2d 820]" and, quoting from *Hargrove,* said, " 'In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent.' "

Whether or not this Court would overlook a conflict of circuits on a mere rule of pleading, what is presented here is that, by reason of conflict of circuits, the same action is held to be innocent in the First Circuit and criminal in the Sixth Circuit.

IC.

"[Petitioner's] criminal intent was clearly proved," says the Government (G. br. p. 6), apparently as part of an argument almost but not quite made that evidence at trial can supply the elements which the indictment fails to provide. We would not bother to reply to this incomplete argument except that it is based upon a serious misquotation of the record below.

In its statement (p. 4) and again in argument, the Government says:

> "Petitioner O'Brien told customs agents that Mr. Young, the president of the Detroit Harbor Terminal, had asked him to remove *the merchandise* from the yard." (G. br. pp. 8-9.) (Emphasis supplied.)

There is no such testimony. The only evidence of O'Brien's participation was his statement that "he had been asked

about five or six months previous to this date by Mr. Young * * * if he would arrange to have someone remove *some scrap* from the terminal" (73a). Young was asked if he had a conversation with O'Brien "relative to the removal of junk or scrap" and his answer was "I could have. I don't remember" (120a-121a).[3]

The sufficiency of the evidence was O'Brien's first point on appeal to the Court below. It was not raised in the petition for certiorari only because the question is of little significance except to the parties involved. It would not be raised now except for the Government's misquotation. In the setting of this case, the great difference between "some scrap" and "some merchandise" is apparent to anyone familiar with the record.[4]

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[3] Young said he never gave permission to remove "merchandise."

[4] O'Brien's defense was based upon the rationale of *Morissette v. United States*, 342 U.S. 246. He requested and received the following instruction:

> "It is his further theory that he was approached by a responsible official of the Detroit Harbor Terminal and requested to notify a scrap dealer or junk collector of the existence of this scrap on the premises of the Detroit Harbor Terminal, with the view to having the scrap dealer or junk collector remove the scrap, and that because of this, the defendant O'Brien contacted Sam Finazzo, who, has been acquitted in this case, and asked Finazzo if he would be interested in removing the scrap. * * *
>
> "It is also his theory that if either Finazzo or the defendant Parisi exceeded his request that they remove scrap, and in fact removed valuable merchandise, that he in no way aided and abetted such removal."

II.

Blumenthal v. United States[5] doesn't justify the trial court's instruction on Area B. On the contrary, it was there said:

> "It is a question of law for the court to determine what constitutes a common carrier, though it may be a question of fact, whether, under the evidence, if it is disputed, a carrier comes within the definition of a common carrier and is carrying on its business in that capacity." 88 F.2d at 528.

We agree that what constitutes a bonded warehouse is a question of law. But whether Area B of the terminal was such a bonded warehouse was most certainly a question of fact. Indeed, the trial court recognized the instruction to be a "comment on the legal effect of the evidence," but maintained that it did not "unduly invade the province of the jury." 255 F. Supp. 766.[6]

III.

The Government now urges (G. br. p. 9) that the general cautionary instruction prevented prejudice to petitioners through the argument on O'Brien's failure to contradict the testimony of witness Young. The assertion is without authority, and contrary to the Government concession made in *Stewart v. United States*, 366 U.S. 1, 10, that "the danger of the situation would have been increased by a cautionary instruction."

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[5] 88 F.2d 522, cited in Government brief, p. 8.

[6] The trial judge maintained that the application for the bond covering Area B and the accompanying map were "assumed to be accurate" and "their authenticity was not questioned." These assertions are belied not only by petitioners' extensive cross-examination of the witnesses on the point, but by their rejected requested instructions.

IV.

The deliberate vagueness of the Government's disclosure of illegal electronic eavesdropping and the carefully guarded language used in making it strongly suggest that even the Solicitor General is not satisfied with the accuracy and completeness of the information received from the FBI which he now tenders to this Court.

In one important matter, we can demonstrate the disclosure is inaccurate. The Solicitor General argues that reversal of petitioner O'Brien's conviction is not required because "he was not, like the petitioner in *Black*,[7] personally the subject of direct surveillance." This assertion is gainsaid by the record in *Hoffa v. United States*, No. 32, this term.[8] There, an FBI agent testified that he was assigned to a surveillance of O'Brien (3366a) during January and February, 1964.[9] The phone call O'Brien made to his attorney upon which the FBI eavesdropped was likewise in January, 1964.

The sworn testimony of FBI agents in *Hoffa* was that the numerous observations and photographs of the defendants and their attorneys were "incidental to the surveillance we were conducting" of O'Brien and others acquainted with Hoffa (3411a). Now, in *O'Brien*, although the time period overlaps, electronic eavesdropping on O'Brien's discussion of his case with others and conversations with his lawyer are incidental to an investigation of an unidentified ac-

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[7] *Black v. United States*, 385 U.S. 26.

[8] The question of trial surveillance of Hoffa was not before this Court because of the limited grant of certiorari. For that reason the Solicitor General may have overlooked that record. But the issue was raised and a record made in the lower courts. The 4-digit references in this portion of our reply are to Appellants' Joint Appendix filed in the Court of Appeals for the Sixth Circuit in *United States v. Hoffa, et al.*, Nos. 15876-15879.

[9] O'Brien was under surveillance in Chattanooga, Tennessee, from the time of his arrival at the airport (3380a) which indicates that the surveillance preceded his arrival.

quaintance and not part of a surveillance of O'Brien. And if the unidentified acquaintance of O'Brien should go on trial, who can say under what shell the Government will place the pea?

The disclosures require reversal regradless of who was in the focus of the FBI's illegal activity. Here, as in *Black* and *Schipani*, the Government admits its violation of both the Fourth and Sixth Amendments. As in those cases, the convictions should be reversed for new trial. At the new trial, all factual issues can be thoroughly aired, including the strength and impact of the Government's Fourth and Sixth Amendment violations. Such disposition of this case would avoid the necessity of considering whether to review the questions presented for certiorari. Any other disposition of the case in regard to the Fourth and Sixth Amendment questions, such as the remand requested by the Government, should fairly preserve the opportunity for this Court, now or in the future, to consider whether, as we urge, the questions presented in our petition warrant this Court's review.

Respectfully submitted,

PHILIP A. GILLIS,
Attorney for Petitioner O'Brien,
2312 Guardian Building,
Detroit, Michigan 48226.

IVAN BARRIS,
Attorney for Petitioner Parisi,
2066 Penobscot Building,
Detroit, Michigan 48226.

ARTHUR KARGER,
600 Madison Avenue,
New York, New York.

BERNARD J. MELLMAN,
408 Olive Street,
St. Louis, Missouri